

1           **P O R T E R | S C O T T**

2           A PROFESSIONAL CORPORATION  
3           Stephen E. Horan, SBN 125241  
4           350 University Ave., Suite 200  
5           Sacramento, California 95825  
6           TEL: 916.929.1481  
7           FAX: 916.927.3706

8  
9           Attorneys for Defendant,  
10          WITHERS FOOD SERVICE, INC.

11  
12          **UNITED STATES DISTRICT COURT**  
13  
14          **NORTHERN DISTRICT OF CALIFORNIA**

15          RICK FUTIA,

16          Case No. CV08 1207-HRL

17          Plaintiff,

18          **DEFENDANT WITHERS FOOD  
19          SERVICE, INC.'S ANSWER TO  
20          PLAINTIFF'S FIRST AMENDED  
21          COMPLAINT AND DEMAND FOR JURY  
22          TRIAL**

23          v.  
24          WITHERS FOOD SERVICE, INC., JOHN  
25          PAK, JEEHEE PAK and MEXPORT, INC.,

26          Compl. Filed: 02/28/08  
27          Defendants. First Amended Compl. Filed: 04/03/08

28          \_\_\_\_\_  
29          Defendant WITHERS FOOD SERVICE, INC. answers Plaintiff's First Amended Complaint  
30          as follows:

31          Answering Paragraph 1, Defendant lacks information sufficient to admit or deny the  
32          allegations contained in said paragraph and on that basis denies each and every allegation contained  
33          in said paragraph.

34          Answering Paragraph 2, Defendant admits that Kirk's Steakburgers is a restaurant located at  
35          1330 South De Anza Blvd., San Jose, California and is a restaurant open to the public. Defendant  
36          operates and leases the restaurant, but does not own the land.

Answering Paragraph 3, Defendant lacks information sufficient to admit or deny the allegations contained in said paragraph, which include legal conclusions and on that basis denies each and every allegation contained in said paragraph.

Answering Paragraphs 4, 5 and 6, Defendant admits that jurisdiction and venue are proper and assignment to the San Jose intradistrict is proper.

Answering Paragraph 7, the allegations in said paragraph contain legal conclusions which do not require a response and on that basis, Defendant denies each and every allegation contained in said paragraph.

Answering Paragraph 8, no response is required.

Answering Paragraph 9, Defendant admits that it operated a restaurant called Kirk's Steakburgers and denies the remaining allegations on the grounds that they are legal conclusions.

Answering Paragraph 10, Defendant lacks information sufficient to admit or deny the allegations which include legal conclusions and on that basis they are denied.

Answering Paragraph 11, the allegations consist of legal conclusions and on that basis Defendant denies each and every allegation of said paragraph.

Answering Paragraph 12, the allegations consist of legal conclusions and on that basis Defendant denies each and every allegation of said paragraph.

Answering Paragraph 13, Defendant lacks information sufficient to admit the allegations contained in said paragraph and on that basis denies each and every allegation contained in said paragraph.

Answering Paragraph 14, the allegations are legal conclusions and on that basis, Defendant denies each and every allegation contained in said paragraph.

111

Answering Paragraph 15, Defendant lacks information sufficient to admit the allegations contained in said paragraph. Additionally, the allegations contained in said paragraph contain legal conclusions and on that basis, Defendant denies each and every allegation contained in said paragraph.

Answering Paragraph 16, Defendant lacks information sufficient to admit the allegations contained in said paragraph. Additionally, the allegations contained in said paragraph contain legal conclusions and on that basis, Defendant denies each and every allegation contained in said paragraph.

Answering Paragraph 17, Defendant lacks information sufficient to admit the allegations contained in said paragraph. Additionally, the allegations contained in said paragraph contain legal conclusions and on that basis, Defendant denies each and every allegation contained in said paragraph.

Answering Paragraph 18, the allegations contained in said paragraph contain legal conclusions and on that basis, Defendant denies each and every allegation contained in said paragraph.

Answering Paragraph 19, Defendant incorporates the answers to Paragraphs 1-18 above.

Answering Paragraph 20, the allegations contained in said paragraph contain legal conclusions and on that basis, Defendant denies each and every allegation contained in said paragraph.

Answering Paragraph 21, the allegations contained in said paragraph contain legal conclusions and on that basis, Defendant denies each and every allegation contained in said paragraph.

Answering Paragraph 22, the allegations contained in said paragraph contain legal conclusions and on that basis, Defendant denies each and every allegation contained in said paragraph.

Answering Paragraph 23, the allegations contained in said paragraph contain legal conclusions and on that basis, Defendant denies each and every allegation contained in said paragraph.

Answering Paragraph 24, the allegations contained in said paragraph contain legal conclusions and on that basis, Defendant denies each and every allegation contained in said paragraph.

111

1           Answering Paragraph 25, the allegations contained in said paragraph contain legal conclusions  
 2 and on that basis, Defendant denies each and every allegation contained in said paragraph.

3           Answering Paragraph 26, the allegations contained in said paragraph contain legal conclusions  
 4 and on that basis, Defendant denies each and every allegation contained in said paragraph.

5           Answering Paragraph 27, the allegations contained in said paragraph contain legal conclusions  
 6 and on that basis, Defendant denies each and every allegation contained in said paragraph.

## 8           **AFFIRMATIVE DEFENSES**

### 9           **FIRST AFFIRMATIVE DEFENSE**

10          The First Amended Complaint, in its entirety and through each separately stated cause of  
 11 action, fails to state facts sufficient to constitute a viable cause of action against this answering  
 12 Defendant upon which relief can be granted.

### 14          **SECOND AFFIRMATIVE DEFENSE**

15          Defendant avers that Plaintiff's First Amended Complaint is barred, in whole or in part, by the  
 16 applicable statute of limitations.

### 17          **THIRD AFFIRMATIVE DEFENSE**

18          Defendant avers that Plaintiff has failed to notify Defendant and appropriate state authorities  
 19 about the averred violations, and therefore failed to exercise his administrative exhaustion  
 20 requirements under California and federal law. Plaintiff has failed to notify Defendant in order to  
 21 provide an opportunity to remediate before filing suit to likely resolve averred access problems fairly,  
 22 and therefore failed to reasonably mitigate his damages.

### 24          **FOURTH AFFIRMATIVE DEFENSE**

25          Defendant asserts the financial and feasible defense based on future construction/contractor  
 26 bids regarding proposed access changes.

**FIFTH AFFIRMATIVE DEFENSE**

Defendant is informed and believes that some or all of the proposed access changes are not "readily achievable" as defined by applicable access law and/or are *de minimis* alleged violations.

**SIXTH AFFIRMATIVE DEFENSE**

Defendant is informed and believes that any proposed access changes would cause a loss of function, space or facility where the general public is concerned, and that said proposed changes would cause practical difficulty, unnecessary hardship, and extreme difficulty, and the equivalent facilitation has been provided.

WHEREFORE, Defendant WITHERS FOOD SERVICE, INC. prays for judgment against Plaintiff RICK FUTIA as follows:

1. Denial of all right to injunctive relief, declaratory judgment, and/or damages pursuant to Plaintiff's claims in the First and Second Claims for Relief;

2. Denial of any and all damages, including attorney's fees, litigation expenses, costs and punitive damages;

3. For reasonable attorney's fees and litigation expenses and costs in defense of Plaintiff's First Amended Complaint; and

4. Such other and further relief as the court may deem just and proper.

///

///

///

///

///

///

**DEMAND FOR JURY TRIAL**

The Defendant WITHERS FOOD SERVICE, INC., hereby demands a jury trial on all issues to which such a right exists.

DATED: May 5, 2008

PORTR SCOTT  
A PROFESSIONAL CORPORATION

By /s/ STEPHEN E. HORAN  
STEPHEN E. HORAN, ESQ.  
Attorneys for Defendant,  
WITHERS FOOD SERVICE, INC.